SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 230

EDWIN R. LEWINSON,

Appellant,

against

ROBERT J. CREWS, as County Clerk, Kings County,

Appellee.

ON APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

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14th Amendment, U. S. Constitution 2, 3

MISCELLANEOUS

Bauman and Yoder, Placing the Blind and Visually Handicapped in Professional Occupation (1962, Department of Health, Education and Welfare, Washington D. C.), Chapter 8 7

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ON APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

The appellant appeals from a judgment of the Court of Appeals entered April 3, 1968 and submits this Statement to show this court that it has jurisdiction on the appeal and that substantial questions are involved.

Opinions

The Court of Appeals wrote no opinion. Its memorandum, reported in 21 N. Y. 2d, 898, adopted the majority opinion written by the majority of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department (Appendix A, *post,* page 13).

The Appellate Division, which divided 4-1 in its decision, wrote an opinion, reported in 28 A. D. 2d, 111, which appears in Appendix B, *post,* page 13 and a dissenting opinion written by Justice Hopkins, Appendix BB, *post,* page 17.

Special Term of the Supreme Court of New York wrote an opinion which is reported in 49 Misc. 2d, 1050, and appears in the transcript of the Record, page 20.

Jurisdiction

The judgment of the Court of Appeals of New York was made and entered on April 3, 1968, a copy of which appears herein as Appendix C, *post,* page 21. The Court of Appeals amended its judgment on April 17, 1968, to certify that the federal constitutional questions raised on this appeal were raised in that court and necessarily passed upon by it, Appendix D, *post,* page 23.

A Notice of Appeal was served, and entered on June 21, 1968 in the office of the Clerk of the Supreme Court, Kings County, which possesses the record.

Questions Presented

1. Whether the statute, Section 596 of the Judiciary Law of New York on its face (as construed) and as applied to appellant is repugnant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether said Section 596 on its face (as construed) and as applied is repugnant to the Constitution of the United States, the Fourteenth Amendment thereof, in that it denies to the appellant, a citizen of New York, the privileges of a citizen of the United States.

3. Whether said Section 596 on its face (as construed) and as applied, is repugnant to the Constitution of the United States, Fourteenth Amendment thereof, in that it denies the appellant of due process of law.

Statute Involved

The statutory provision directly involved is Section 596, Judiciary Law of New York (McKinney's Consolidated Laws of New York, Book 29). It reads as follows:

"Section 596. Qualifications of jurors.

In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a person must:

(1) Be a citizen of the United States, and a resident of the county.

(2) Be not less than twenty-one, nor more than seventy years of age.

(3) Be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value.

(4) Be in the possession of his natural faculties and not infirm or decrepit.

(5) Not have been convicted of a felony or a misdemeanor involving moral turpitude.

(6) Be intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly.

A person dwelling or lodging or having or maintaining a dwelling or lodging in a county for the greater part of the time between October first and

June thirtieth next thereafter, is a resident of that county, within the meaning of this section. Added L. 1940, c. 202, § 1, eff. Sept. 1, 1940."

Statement

The appellant, Professor Lewinson, a totally blind person from birth, was excluded as ineligible to serve as a juror *solely* because of that physical condition (R. 7). He is exceptionally qualified by reason of education and occupation as the courts below recognized in their opinions. He is a graduate with an A.B. degree from the University of Michigan. He holds the degrees of Master of Arts and of Doctor of Philosophy from Columbia University. His published doctoral thesis is entitled "John Purroy Mitchel, The Boy Mayor of New York", Astra Books, 1965, a copy of which was submitted and filed at the hearing in support of his petition (R. 6 paragraph Fourth thereof), and referred to in the opinion below, R. 20, 23, line fourteen. He is 37 years of age and a resident of Brooklyn, New York. He is an assistant professor in history and political science at Seton Hall University, South Orange, New Jersey, to which and from which he commutes, unassisted by any person, daily from 764 Quincy Street, Brooklyn, by public transportation.

He received a notice from appellee to serve as a juror. But he was rejected by appellee after appearing before him on May 21, 1965 (R. 7).

Thereupon he commenced a proceeding against the appellee for a review of the appellee's determination. Special Term of the Supreme Court of New York denied the application. It said at the end of its opinion, 49 Misc. 2nd, 1050; 296 N.Y.S. 2nd, 185:

> "Although petitioner has not been successful herein, his effort serves as an inspiration to all civic-minded people and lends itself to a re-awakening of the desire to participate in civic affairs which many of our populace have permitted to become dormant" (R. 24).

To which it should be added that the appellant also objects to being a second-class citizen and is also inspired to vindicate the right of citizenship of 1,000,000 blind persons (R. 32 footnote).

The opinion points out the unusual nature of this proceeding. Usually, the courts are confronted with applicants who wish to be relieved from jury service. Here, the appellant by contrast seeks to enforce a right to serve.

Appellant argued in addition to the constitutional arguments, that because the statute is ambiguous in fixing the qualifications for jury duty, the appellant therefore should not have been ruled ineligible. Special Term recognized this argument (R. 21, second paragraph). This argument was unfortunately disposed of by the opinion that the county clerk may construe and determine the limitations of the statute (R. 21, third paragraph). Special Term said, in effect, that the public officer is a law unto himself—that *he may construe* the law to suit the circumstances; and therefore, there is nothing for a court to review—not even the meaning of the law.

Upon appeal to the Appellate Division the judgment was affirmed by a 4-1 vote, Justice Hopkins dissenting. The Appellate Division agreed with appellant that it was not within the appellee's powers to construe the law. Nevertheless, the appellate court held that the statute as it construed it, rendered a blind person ineligible to act as a juror in any court, at any time and in any place (R. 27).

That court also rejected the constitutional claims raised on this appeal on the ground that no constitutional rights of appellant are affected, but that his eligibility depends on statutory interpretation (R. 30). Justice Hopkins in dissent was of the opinion that appellant's constitutional rights were infringed (R. 30).

The Court of Appeals of New York affirmed, and expressly adopted the opinion of the majority at the Appel-

late Division, Appendix A, *post,* page 13. It subsequently amended its judgment to certify that the federal constitutional questions tendered upon this appeal were raised and necessarily passed upon the Court of Appeals, Appendix D, *post,* page 23.

Stage and Manner of Raising Federal Questions

The questions here presented were raised in the Court of Appeals and necessarily passed upon by that court. Its certificate to that effect is annexed, Appendix D, *post,* page 21.

The questions here presented were raised in the Appellate Division and passed upon there (R. 30).

The Questions are Substantial

The Court of Appeals, by expressly adopting the opinion of the Appellate Division, thus construed the ambiguous statute to mean that a blind person is ineligible to serve as a juror. It also held that the statute so providing, did not infringe upon the appellant's rights or privileges under the Constitution of the United States.

By way of introduction, it should be noticed that although the Court of Appeals is authorized to make rules regulating the admission of attorneys at law, there is no provision excluding blind lawyers from practicing their profession (New York Court of Appeals, Rules for Admission of Attorneys). In fact, there are many blind practicing lawyers. When one considers that a lawyer has a professional responsibility in the administration of justice as an all-year, seven-day, 24-hour a day basis, it is astonishing that a juror should be excluded. A juror's service and responsibility by contrast is limited. He is called about every three years, if that frequently. His term is from two to four weeks, depending upon the court.

The number of times he actually is impanelled is sporadic. A juror may be challenged, so that if the parties are not satisfied with a blind person he can be excused. (In this connection, appellant and Justice Hopkins pointed out that the problem could be resolved in that manner; but the Appellate Division held it would be too much of an inconvenience—as if inconvenience were the answer to resolution of a right, R. 30, 34.)

Likewise, judges are not disqualified for blindness by the Constitution of the State of New York or its Judiciary Law. Indeed, the New York Times carried an item of the appointment by President Johnson of a blind person as a federal judge, accompanied with the President's words, "few appointments gave him such inner satisfaction" and how the President rejoiced in the example of Judge Simpson as an example to overcome handicaps (R. 9). The transcript of the record contains expert testimony concerning the capacities of blind persons in their profession as lawyers and justices (R. 10, 12, 14, 15); see also, Bauman and Yoder—"Placing the Blind and Visually Handicapped in Professional Occupation" (published 1962, Department of Health, Education and Welfare, Washington, D. C.), Chapter 8 on lawyers and justices.

See also, Justice Hopkins in dissent (p. 34) where he said the following:

> "The ability of the blind to serve in the seat of judgment is reflected by the career of many non-sighted persons.[3] Blindness does not disable one to be a lawyer or a judge; it is contradictory to use the defect as a reason of rejection as a juror, especially since the juror does not act alone but in conjunction with eleven other persons to reach a joint determination.

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[3] United States Senator (Thomas P. Gore); members of Parliament (Henry Fawcett, Sir Ian Fraser); judges (Charles R. Simpson, Clair L. Finch). Blindness is not a disqualification for holding public office (*State ex rel. Shea* v. *Cocking*, 66 Mont. 169).

True, the blind juror cannot see the witness or real evidence. But an appraisal of testimony does not depend on the mere visual presentation; the voice of the witness and the inherent probability of the truth of the testimony are as cogent signs of the credibility of the evidence. In the use of these tests a blind person is no more handicapped than the sighted.

Indeed, the selection of jurors depends largely on the judgment of the suitors at the time of the trial. Any predilection or bias on the part of a prospective juror which would militate against a fair verdict is thus left to exposure at the voir dire; and I see no difference between the exercise of judgment in the selection of jurors between physical blindness and a blind spot in the emotional or intellectual personality. In each case the acceptance of the juror hangs on the assessment of his qualities to serve in the particular litigation to be tried.

As the majority fairly admits, save for the existence of blindness, the petitioner has an exceptional educational background. He undoubtedly could act in the capacity of a juror as well as the average sighted juror. The community has increasingly recognized the potential reservoir of talent and intelligence which the blind possess in common with other members of the group through the expansion of schools and auxiliary services; jury service, it does not seem to me is beyond their capabilities."

The questions presented raises important and novel points. It has been observed: "to what extent, if at all, the equal protection clause prevents the exclusion from jury service of any class of persons on any basis other than race or color is still an unsettled problem of constitutional interpretation". Indeed, this court in *Thiel* v. *Southern P. Co.*, 328 U. S. 217 at 220, noted that the American tradition of trial by jury necessarily contemplates an impartial jury drawn from a cross-section of the country. In that case it

said, "Jury competence is an individual rather than a group or class matter" (at p. 220).

Bass v. *Mississippi,* 381 Fed. 2d, 692, 696, presents the conflicts in the courts as to exclusion of groups, other than race, and looks with hope to this court for resolution of that problem.

Yet in the case of Professor Lewinson, who was highly praised for his competence and who has every qualification of intelligence for eligibility, was nevertheless excluded. He was put into a group or class for disqualification, in violation of the *Thiel doctrine.* See also, *Virginia* v. *Rives,* 100 U. S. 313; *Pierre* v. *Louisiana,* 306 U. S. 354; *Smith* v. *Texas,* 311 U. S. 128; *Hill* v. *Texas,* 316 U. S. 400, 404; *Cassell* v. *Texas,* 339 U. S. 282.

Although the application of the equal protection clause is applied most frequently in jury questions to discrimination on the ground of color or creed, there is no good reason why it cannot be applied to other forms of discrimination even if greater exertion is required to reject attempted showings of a rational basis for the discrimination. In keeping with the pronouncement of this court in *Thiel* that disqualification must be on an individual basis and not on a group basis, this court, in the exercise of its supervisory powers negated discrimination in qualifications for jury duty based on sex. *Ballard* v. *United States,* 329 U. S. 187. In that case it could have been argued as to the rationality of the discrimination that there were physical and social factors which supported the distinction. Likewise, inconvenience to the court was given below (R. 30) to support the rational ground for discrimination against blind persons. Yet, in *Ballard* this court rejected such group disqualification. See also, *White, et al.* v. *Crook,* 251 F. Supp. 401 (1966), where the doctrine in *Ballard* was adopted on a constitutional basis as applied to a State.

Correlatively, the rights of litigants to a jury composed of a cross-section of the country are impaired. The toleration of this discrimination against blind persons is not

without practical consequences. It may lead to claims that judgments rendered in the courts of this state should be invalidated because of the systematic exclusion of the large segment of blind persons (see statistics of Justice Hopkins, R. 32) such as has followed from discrimination against colored persons or of women. *Strauder* v. *West Virginia,* 100 U. S. 303; *Hernandez* v. *Texas,* 347 U. S. 475, 482; *Ballard* v. *United States,* 329 U. S. 187.

In *Strauder* the court said (p. 308):

> "The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."

Since the right to a jury trial has been extended by *Duncan* v. *Louisiana,* No. 410, O.T. 1967, decided May 19, 1968, such right must be a correlative of non-exclusion, *Fay* v. *New York,* 332 U. S. 261, 288. If exclusion by group is countenanced as to non-sighted individuals, it is conceivable that a state may be able to exclude on the basis of *any degree of impairment of vision.* When one considers the enormous amount of persons who have defects in vision—one need only observe those who wear spectacles —one must be concerned with the extent of the power to exclude a citizen from jury service based on vision.

The appellant has standing, of course, to protect himself against his ineligibility as a juror based on discrimination. He also has standing to vindicate the rights of litigants against discrimination because of his exclusion from jury duty. *Griswold* v. *Connecticut,* 381 U. S. 479, 481; *White* v. *Crook, supra; Cassell* v. *Texas, supra,* per Mr. Justice Jackson.

The appellant was also denied his privilege as a citizen of the United States. The appellant is a citizen (R. 6, paragraph "First"). As Justice Hopkins stated below (R. 31): "Traditionally, the right and duty to serve as a juror has

been accounted to be a privilege of citizenship (cf. Civil Rights Law, 8, 13)."

This right was noted recently by Justice Harlan in *Duncan* v. *Louisiana, supra.* He observed, citing *De Tocqueville,* that it is part of democracy, for it affords every citizen an opportunity to participate in government process.

In *White* v. *Crook; supra,* the three-judge federal district court held that not only was jury service a civic duty, but a constitutional right. The court held that discrimination in the qualification of a juror based on sex would violate the equal protection clause of the Constitution of the United States.

Said the court (p. 408):

> "As stated earlier in this opinion, jury service on the part of the citizens of the United States is considered under our law in this country as one of the basic rights and obligations of citizenship. The women plaintiffs on behalf of themselves and other women similarly situated contend very forcefully that the Alabama statute that bars their exercise of this basic right is unconstitutional. This attack on Alabama's complete exclusion of women from jury service is based on the Equal Protection Clause of the Fourteenth Amendment. The argument that the Fourteenth Amendment was not historically intended to require the states to make women eligible for jury service reflects a misconception of the function of the Constitution and this Court's obligation in interpreting it. * * *
>
> "Jury service is a form of participation in the processes of government, a responsibility and a right that should be shared by all citizens, regardless of sex. The Alabama statute that denies women the right to serve on juries in the State of Alabama therefore violates that provision of the Fourteenth Amendment to the Constitution of the United States that forbids any state to 'deny to any person within its

jurisdiction the equal protection of the laws.' The plain effect of this constitutional provision is to prohibit prejudicial disparities before the law. This means prejudicial disparities for all citizens—including women."

See also:

Hague v. *CIO,* 307 U. S. 496;
Edwards v. *Calif.,* 314 U. S. 160, 177;
Oyama v. *Calif.,* 332 U. S. 633, 640, 645.

No rational connection between appellant's blindness and his jury duty appears. Due process has thus been denied. Blindness, by itself, does not render a person unfit to sit in a court (no more than it does render incompetent a judge or a lawyer). It might create some inconvenience, but there is compensation for it in the high quality such a person could bring. Since no rational basis exists for a conclusion that such a person is devoid of mental capacity to perform the function of a juror, a disqualification on that ground is a denial of due process of law (*Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 238).

Conclusion

It is urged that the statute as construed and applied to disqualify from jury service all blind persons as a group violates fundamental constitutional protections. The questions involved are substantial and of public importance.

Dated, June 21, 1968.

Respectfully submitted,

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APPENDIX A

Memorandum, 21 N. Y. 2d, 898

Order affirmed without costs, on the majority opinion of the Appellate Division.

APPENDIX B

Opinion of Majority of Appellate Division

CHRIST, J.:

This appeal focuses on an issue new to the appellate courts of New York. Is total blindness a disqualification for jury duty pursuant to section 596 of the Judiciary Law? The County Clerk has said yes and the learned Justice at Special Term has agreed; thus, the petition was dismissed.

While we admire the civic spirit which moves the petitioner to persist in his desire to serve as a juror, our determination must rest on other considerations. Section 596 of the Judiciary Law provides in pertinent part as follows:

> "In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a person must: * * *
>
> * * *
>
> 4. Be in the possession of his natural faculties and not infirm or decrepit.
>
> * * *
>
> 6. Be intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly."

It is for the County Clerk to apply these tests and it was he who first decided against the petitioner.

Edwin Lewinson, petitioner, has been totally blind since birth but he has done more with his 35 years of life than many sighted persons of his age. He holds several advanced degrees, including a Ph.D., and he is an assistant professor in the history and political science department at Seton Hall University at South Orange, New Jersey. The petitioner commutes thence daily by public transportation from his home in Brooklyn, New York. In May, 1965, the County Clerk of Kings County summoned him for purposes of qualification as a juror and rejected him initially on the sole ground of his blindness. In the formal proceedings since that time, Mr. Lewinson's inability to read "the English language understandingly" has been added as a reason for disqualification.

Does a sightless person have his "natural faculties" within the purview of the statute? We think not. Subdivision 4, wherein these words appear, quite clearly deals with one's physical attributes and powers. The term is used conjunctively with "infirm and decrepit"—essentially physical characteristics. Eyesight is expected to be found in human beings as a part of nature's complement of sound health and physical equipment. When one is deprived of this power of sight, he falls short of the total capacity which is natural in a human being and thus, by statutory definition, we believe that a blind person cannot be said to be possessed of his "natural faculties".

It is urged upon us that "natural faculties" means not physical attributes but rather powers of mind and memory, reason, judgment and the like. When we examine the structure of the entire statute and read particularly subdivision 6 of section 596, we find the words "intelligent", "sound mind", "good character", "well-informed", "able to read and write the English language understandingly". These are the intellectual qualifications. Were we now

to hold that "natural faculties" in subdivision 4 is also limited to powers of mind and that it does not encompass the physical attributes of human being, subdivision 6 would be rendered redundant. Furthermore, the mind does not operate in a vacuum. It is fed by the senses and the data and the information by which discernment and reasoning are exercised. The judgment reached by the mind is predicated upon the impressions which the senses convey to it. The statute, we are sure, covers and was meant to cover qualifications respecting both the mind and the body.

The interpretation which we put upon the statute is supported by an examination of the practical duties and responsibilities which fall upon a juror.

He is frequently required to evaluate physical evidence. There are still photographs and moving pictures, and there are mechanical objects which demonstrate working parts. Sometimes enlarged fingerprints are the subject of comparison and examination; so, too, are diagrams and enlargements of handwriting exhibits when the genuineness of documents is being questioned. Occasionally, demonstrations are made with diagrams upon a blackboard. These are but a few of the many materials, objects and methods of presentation brought to the courtroom concerning which sight is indispensable to a full understanding.

Sight is also a factor in testing the credibility of a witness. The veracity of a witness is determined in the main by what he says. It may be discovered in the context of the questions and the answers and to some extent by the intonations of his voice. Another aid in this respect is the facial expression and body movement of a witness upon close and intense interrogation. Sight enforces the juror's judgment in this regard. Appellate courts recognize that a witness's physical presence provides assistance to the trier of the facts in evaluating his

testimony, for although the appellate court has all the words of the trial before it in the printed record on appeal, it often bows to the determinations of fact made by the judge or jury at the trial based on personal observations of the witnesses (*63 Building Corp.* v. *Schlacter,* 11 A. D. 2d 743; see also *Amend* v. *Hurley,* 293 N. Y. 587). There is sound reason for this rule of law for at the trial other aids beyond the cold record help to tell truth from falsehood.

A litigant who comes before the Bar of Justice, whether in a criminal case or in civil litigation, wishes to have the impact of his evidence fall with its full weight upon the jury, if there be a jury trial. If his evidence or exhibits are not understood or the force of his interrogation of witnesses is lost, he will not have been afforded his full rights. It is not an adequate protection to say that he may challenge the blind juror on the *voir dire* for if we hold blindness not to be a disqualification under the statute, a challenge for cause will not be available thereafter on that account. A peremptory challenge would be still available but these are limited in number and they are an important right possessed by a litigant; he should not be made to resort to such challenges in order to preserve his right to fair trial.

In requiring "natural faculties" as a qualification for service on a jury, the Legislature may have considered not only the function of a juror, but also the effect his disability would have on the orderly and practical operation of the court's processes. While this factor alone would not support the construction we make, it is a pertinent consideration.

There is no constitutional issue in this case; it is one entirely of statutory interpretation. We find that the County Clerk properly applied the statute. The judgment appealed from must be affirmed.

Beldock, P.J., Ughetta and Brennan, JJ., concur

APPENDIX C

Dissenting Opinion of Justice Hopkins

HOPKINS, J., dissenting:

The qualifications of a juror are defined in the statute (Judiciary Law, § 596), and the court below held, and the respondent here urges, that as County Clerk he has an administrative discretion in enforcing the standard in individual cases. I do not so construe the statute. If the citizen meets the standard, the County Clerk may not reject him for jury duty (*cf. Matter of Ford* v. *O'Byrne*, 222 App. Div. 50). Here the facts are not in dispute, and the respondent cannot apply the statute to debar the petitioner from jury service, unless a judicial construction of the statute justifies the exclusion. In this view of the power of the respondent I take it the majority agrees; our division rests on the meaning of the statute *vis-a-vis* a blind citizen.

A citizen is guaranteed certain privileges and immunities (Constitution of the United States, Art. IV, § 2; Fourteenth Amendment; Constitution of the State of New York, Art. I, § 1). Traditionally, the right and duty to serve as a juror has been accounted to be a privilege of citizenship (*cf.* Civil Rights Law, § 13). Correlatively, all persons, whether citizens or aliens, are entitled to a trial by jury composed of citizens representing a broad spectrum of the community. A statute, which, either by definition or by administrative enforcement, prevents jury service by a large segment of the population violates the constitutional guarantees (*Hernandez* v. *Texas*, 347 U. S. 475, 482; *Strauder* v. *West Virginia*, 100 U. S. 303, 308).

The blind is a large segment of our population.[1] A statute which by its definition of qualifications of jurors

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[1] It has been estimated that the number of blind persons (i.e. blindness as defined by the *Social Security Act* of 1935) in the

(Footnote continued on following page)

denied to the blind the right of jury service should do so in unmistakable terms; and the discrimination must be based on rational grounds. But our statute does not single out blindness as a ground of disqualification, as it does felons or the non-propertied. In order to deprive the blind citizen of the right to be a juror, the majority finds an implicit disqualification in the words of the statute that a juror must "be in the possession of his natural faculties and not infirm or decrepit." Certainly, a blind person is not infirm or decrepit, and I think that in the context of the statute he is in the possession of his natural faculties. The statute must be considered in the light of the constitutional purpose to diffuse the right and duty of jury service throughout the whole citizenry. The ability to serve effectively as a juror must be the point of the statute; and the possession of intellectual power to discharge the duty is the meaning of the term "natural faculties" which the statute employs.

(Footnote continued from preceding page)

United States in 1966 was 421,250, and that in 1980 their number will approximate 519,000 (*Estimated Statistics on Blindness and Vision Problems,* National Society for the Prevention of Blindness, Inc., p. 25 [1966]; *Estimated Total Cases and New Cases of Legal Blindness by State,* 1966, National Society for the Prevention of Blindness, Inc. [1967]). Of those legally blind in 1966, it appears that the greatest number reside in this state. The number of persons barred from jury service by my colleagues' holding, however, extends beyond those called legally blind and undoubtedly includes many persons suffering severe vision impairments. Thus, using as a standard the ability to read ordinary newsprint with the aid of glasses, the U. S. National Health Survey has estimated that in the period 1959-1961 approximately 988,000 persons suffered severe vision impairments. (*Selected Impairments by Etiology and Activity Limitation, United States,* July 1959-June 1961, U. S. Department of Health, Education and Welfare, Public Health Service.) The world's blind population is thought to be about 9,500,000 (1960 *Britannica Book of the Year* 108).

Appendix C

The words of the statute ("in possession of [his] natural faculties and not infirm or decrepit") are found in the Revised Statutes of 1829 (Rev. St., Part III, ch. VII, Title 4, § 13[4]). That the words applied to intellectual capacity is evident from a following provision in the same chapter and title (§ 33):

> "The court shall discharge any person from serving on a jury, in the following cases:
>
> * * *
>
> 2: When it shall appear that such person is under 21 years of age, or over sixty years of age; or that he is not in possession of any of his rational faculties.
>
> * * *"

Thus, the statute equated decrepitude and infirmity with a given age, and natural faculties with rational faculties.[2] It is notable that the present authority of the court to discharge a juror is not as specific and speaks in general terms (Judiciary Law, § 605; see comment, Sixth Annual Report of the Judicial Council [1940] 212). The retention of the language of the Revised Statutes signifies an intention to continue the original meaning (*People ex rel. Van Riper* v. *N. Y. Catholic Protectory,* 106 N. Y. 604, 613; *Buduson* v. *Curtis,* 285 App. Div. 517, affd. 309 N. Y. 879). The right of jury service, then, unless limited by a clear direction, reposes in all citizens; the litigants may, of course, exercise their power of selection at the *voir dire.* A litigant might well favor the acceptance of a blind juror to serve in his case, despite the physical handicap.

The ability of the blind to serve in the seat of judgment is reflected by the career of many non-sighted persons.[3]

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[2] These qualifications were said in 1940 to have existed for more than a hundred years (Sixth Annual Report of the Judicial Council [1940] 206).

Appendix C

Blindness does not disable one to be a lawyer or a judge; it is contradictory to use the defect as a reason of rejection as a juror, especially since the juror does not act alone but in conjunction with eleven other persons to reach a joint determination.

True, the blind juror cannot see the witness or real evidence. But an appraisal of testimony does not depend on the mere visual presentation; the voice of the witness and the inherent probability of the truth of the testimony are as cogent signs of the credibility of the evidence. In the use of these tests a blind person is no more handicapped than the sighted.

Indeed, the selection of jurors depends largely on the judgment of the suitors at the time of the trial. Any predilection or bias on the part of a prospective juror which would militate against a fair verdict is thus left to exposure at the *voir dire;* and I see no difference between the exercise of judgment in the selection of jurors between physical blindness and a blind spot in the emotional or intellectual personality. In each case the acceptance of the juror hangs on the assessment of his qualities to serve in the particular litigation to be tried.

As the majority fairly admits, save for the existence of blindness, the petitioner has an exceptional educational background. He undoubtedly could act in the capacity of a juror as well as the average sighted juror. The community has increasingly recognized the potential reservoir of talent and intelligence which the blind possess in common with other members of the group through the expansion of schools and auxiliary services; jury service, it does not seem to me, is beyond their capabilities.

I vote to reverse the order and to grant the petition.

---

[3] United States Senator (Thomas P. Gore); members of Parliament (Henry Fawcett, Sir Ian Fraser); judges (Charles R. Simpson, Clair L. Finch). Blindness is not a disqualification for holding public office (*State ex rel. Shea* v. *Cocking,* 66 Mont. 169).

APPENDIX D

Judgment of Court of Appeals

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of April in the year of our Lord one thousand nine hundred and sixty-eight, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD, Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur April 3, 1968.

2. No. 412 67

In the Matter of the Application of
EDWIN R. LEWINSON,

Appellant,

For a Review of the Determination of ROBERT J. CREWS, as County Clerk, Kings County,

Respondent.

BE IT REMEMBERED, That on the 9th day of September in the year of our Lord one thousand nine hundred and sixty-seven, Edwin R. Lewinson, the appellant in this cause, came here unto the Court of Appeals by Emanuel Redfield his attorney and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Robert J. Crews, as County Clerk of Kings County, the respondent—in said cause, afterwards appeared in said Court of Appeals by Seymour Besunder, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Emanuel Redfield, of counsel for the appellant, and by Mr. Seymour Besunder, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs, on the majority opinion at the Appellate Division.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well as the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c..

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York.

Court of Appeals, Clerk's Office,
Albany, April 3, 1968.

I HEREBY CERTIFY that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

(Seal.)

APPENDIX E

Order Amending Judgment

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the seventeenth day of April, A. D. 1968.

Present, HON. STANLEY H. FULD, Chief Judge, presiding.

Mo. No. 438

In the Matter of

the Application of EDWIN R. LEWINSON,

Appellant,

For a Review of the Determination of ROBERT J. CREWS, as County Clerk, Kings County,

Respondent.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution

of the United States, viz.: Appellant contended that to disqualify him as a juror because of his blindness violated his rights under the equal protection clause of the Fourteenth Amendment as well as his rights under the due process clause of that Amendment. The Court of Appeals held that appellant's constitutional rights had not been violated.

And the Supreme Court of Kings County hereby is requested to direct its Clerk to return said remittitus to this Court for amendment accordingly.

A copy

Garson Kimball,
Deputy Clerk.

APPENDIX F

Statutes

(JUDICIARY LAW OF NEW YORK)

"Section 590. County clerk to select, draw, summon and empanel jurors.

The county clerks of the counties included within a city having a population of one million or more shall select, draw, summon and empanel all jurors for all courts within their respective counties and shall decide upon their qualifications and exemptions, in the manner prescribed by this article, those sections of the code of criminal procedure regarding grand jurors, or the rules adopted pursuant thereto, provided, however, that when preparing ballots for jurors, he shall indicate on the ballot of each juror whether he has conscientious scruples against the death penalty as would prevent him from returning a verdict of guilty of any crime punishable by death. But this section shall not operate to impair the right to challenge a particular juror at a trial. As amended L. 1965, c. 778, § 1, eff. Sept. 1, 1965.

Section 592. Appellate divisions to make rules.

The justices of the appellate divisions of the supreme court in the first and second judicial departments, or a majority of such justices, acting jointly, shall adopt and may from time to time amend and rescind rules not inconsistent with statute, to regulate the time, manner and practice of examining, selecting, drawing, summoning and empaneling jurors, and the number of each to be selected, drawn and empaneled in and for the several courts within the counties of a city having

a population of one million or more, and in addition to regulate in any other respects the duties enjoined by law on the county clerks and on the county jury boards in such counties with respect to the administration of the jury system. Added L. 1940, c. 202, § 1, eff. Sept. 1, 1940.

Section 593. Specific powers and duties of county clerk.

In accordance with the law and pursuant to the rules of the justices of the appellate division, each county clerk shall:

(1) make personal examination of individuals concerning their eligibility or the eligibility of others for jury service, and for that purpose to issue and enforce notices, mandates and subpoenas,

(2) hear and determine claims for exemption from jury service within the county,

(3) prepare ballots for qualified jurors,

(4) draw panels of jurors for regular and adjourned terms of court,

(5) notify and summon jurors drawn for service,

(6) take any steps necessary to bring about the punishment of those who violate the laws and rules relating to the drawing, selection, summoning and empaneling of jurors,

(7) consult with the county jury board as provided in section five hundred and ninety-one of this article, and

(8) do all things necessary and proper for the true execution of his powers and duties. As amended L. 1964 c. 576, § 50, eff. April 16, 1964.

Appendix F

Section 595. Examination as to fitness; personal interviews; police records.

No person's name shall be entered on a jury list unless (a) he has been personally interviewed by the county clerk, (b) he has stated his qualifications under oath, or in a certificate or questionnaire pursuant to section twelve hundred thirty-two-a of the penal law, (c) his name has been forwarded to the police department for checking against the records of that department and a report received or a reasonable time had elapsed without such a report, and (d) the county clerk, in the case of grand jurors, shall also have received a certificate of the central bureau of criminal identification, records and statistics from the state commissioner of correction in accordance with the provisions of section six hundred nine of this article. As amended L. 1953, c. 493, § 1, eff. April 4, 1953; L. 1955, c. 797, § 5, eff. July 1, 1955.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 25 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 230

EDWIN R. LEWINSON,

Appellant,

—against—

ROBERT J. CREWS, as County Clerk, Kings County,

Appellee.

ON APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

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United States v. *Foster,* 83 F. Supp. 197 5

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Section 1865 (b) Public Laws 90-274, 82 Stat. 53 5

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Miscellaneous

Brooklyn Barrister (Official Publication of the Brooklyn Bar Association) Volume 19, April, 1968, No. 6, Page 199 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 230

EDWIN R. LEWINSON,

Appellant,

—against—

ROBERT J. CREWS, as County Clerk, Kings County,

Appellee.

ON APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

Appellee, Robert J. Crews, as County Clerk, Kings County, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal from a State Court upon ground that it does not present a substantial federal question, and is not within the jurisdiction of the Court, and was expressly passed upon, and that the judgment rests on an adequate non-federal basis.

Opinions

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department reported in 28 A.D. 2d 111, was affirmed by the Court of Appeals, upon the majority opinion of the Appellate Division, reported in 21 N.Y. 2d 898, and appear as Appendix A and Appendix B to appellant's jurisdictional statement.

Jurisdiction

Appellant invokes the jurisdiction of the Court pursuant to 28 U.S.C. Section 1257 (2).

Statute Involved

Judiciary Law of New York Section 596.

Question Presented

Whether Section 596 of the Judiciary Law of New York as passed upon by the Courts of New York is contrary to the Fourteenth Amendment of the Constitution of the United States.

Statement

Petitioner appeared at the Division of Jurors of the County Clerk of Kings County on May 21, 1965 to be examined as to his qualifications to be a juror.

A questionnaire must be completed by each prospective juror, in his own handwriting, in form, as provided by Rule 17, Rules Of The Jury System In The City of New York.

Questions numbered "16" and "17" of such form are set forth in part:

16. Are you physically disabled or incapacitated ..... Is your hearing or eyesight so impaired that you could not intelligently follow a case in Court .....

17. If your answer to any question on line "16" is "Yes", give all particulars .....

Petitioner did not fill out above or any part of questionnaire.

He is totally blind.

He was rejected as a juror because of his inability to complete the questionnaire and his blindness.

A proceeding to Review the Determination of the Court Clerk, rejecting the Petitioner, was dismissed by Special Term. 49 Misc. 2d 1050, 269, N.Y.S. 2d 185.

The judgment was affirmed by the Appellate Division 28 A.D. 2d 111, 282 N.Y.S. 2d 83 and by the Court of Appeals 21 N.Y. 2d 898, 289 N.Y.S. 2d 619.

ARGUMENT

I

Appellant does not meet statutory requirements that he be in possession of his natural faculties and not infirm or decrepit.

In order to be qualified to serve as a juror a person must comply with Section 596 of the Judiciary Law.

Subdivision 4 (now subdivision 3) of said Section requires that a person must be in the possession of his natural faculties and not infirm or decrepit.

Commonly understood as synonymous with the five senses, "Faculty" is defined in Webster's New International Dictionary, Second Edition, Unabridged, as "a physical capability, power of function:—now esp. of the human body or its organs; as the faculty of hearing."

There is a presumption that words in a statute or regulation are to express a particular idea. It must be accepted that the legislature intended that "natural faculties" should include the sense of sight.

The language in Subdivision 4 is thus free of ambiguity, and the County Clerk's conclusion that petitioner was not

in possession of his natural faculties because of his blindness, so as to qualify him as a juror was reasonable and proper.

A person who is totally blind does not have his natural faculties within the purview of the statute.

II

The statute is not unconstitutional because there is a rational basis for the barring of blind people.

The conclusion reached by the County Clerk was reasonable and founded upon a completely rational basis, and is well suited to the administration of the jury system.

On an appeal involving issues of fact or credibility the Appellate Courts give great weight to the determination of the trier of the facts because he sees the witnesses, while the Appellate Courts see only the cold printed record. Even more important than seeing the witness is the seeing of exhibits like photographs, diagrams, writings and models, in cases where words cannot adequately picture the subjects or there are disputes as to what the exhibits show or mean, or there are claims of forgery or alteration of documents.

There is no Constitutional issue involved herein, it is one entirely of statutory interpretation.

The County Clerk must have considerable latitude to cope with matters of ascertaining qualifications of prospective jurors, and where his determination is reasonable, and founded upon a rational basis, it is neither arbitrary nor contrary to law, nor does it violate the Constitution.

It is well established that legislative enactments carry a strong presumption of constitutionality and that unconstitutionality must be demonstrated beyond a reasonable doubt before judicial findings of invalidity may be made.

This section prescribing the qualifications of jurors in cities having a population of one million or more is applicable with respect to qualifications of grand and petit jurors of Federal District Court for the Southern District of New York. *United States* v. *Foster,* D.C. N.Y. 1949, 83 F. Supp. 197.

III

Inability to read and write English language understandably disqualifies a juror.

The requirement of Subdivision 6 (now Subdivision 5) of Section 596 of the Judiciary Law is not met by the appellant.

A person is blind when he lacks the sense of sight by natural defect or deprivation.

While the appellant may be able to write in the English language, he presumably cannot read in the English language. He most certainly can read in Braille, a system of writing for the blind that uses characters made up of raised dots. Surely this cannot be construed as the English language.

The determination by the County Clerk upon this ground is founded upon a rational basis and is a proper interpretation of the statutes, and the rules adopted by the Appellate Division.

IV

Federal law and New York law are substantially the same.

The provisions of Section 596 of the Judiciary Law, of New York, as amended, effective September 1, 1967; and the federal Jury Selection and Service Act of 1968, approved March 27, 1968 (Section 1865(b)) set forth the

same standards for the qualification requirements of jurors.

In an article in the Brooklyn Barrister Volume 19, Number 6 at page 199, the Honorable Emanuel Celler, Chairman of the Judiciary, United States House of Representatives, reporting on the Federal Jury Selection and Service Act states as follows:

> "Wisely, the bill as passed preserves discretion in the Court to disqualify prospective jurors who are either physically or mentally infirm, or where service would tend to prejudice the secrecy of the jury deliberation."

CONCLUSION

The construction of Section 596 of the Judiciary Law of New York by the State Court, does not violate the Constitution of the United States.

Dated: July , 1968

Respectfully submitted,

SEYMOUR BESUNDER
Counsel for Appellee
Civic Centre
Brooklyn, New York 11201
Tel.: 212-643-5897

APPENDIX A

JURY SELECTION AND SERVICE ACT OF 1968
PUBLIC LAW 90-274, 82 Stat. 53

SECTION 1865

"(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he——

"(1) is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district;

"(2) is unable to read, write and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

"(3) is unable to speak the English language;

"(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

"(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal Court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty." Approved March 27, 1968.

APPENDIX B

JUDICIARY LAW OF NEW YORK (MCKINNEYS CONSOLIDATED LAWS OF NEW YORK BOOK 29)

SECTION 596

"In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a person must:

1. Be a citizen of the United States, and a resident of the county.

2. Be not less than twenty-one, nor more than seventy-five years of age, provided however, that a person between seventy and seventy-five years of age shall be excused at the request of any party to the action and such request shall not constitute a peremptory challenge.

3. Be in the possession of his natural faculties and not infirm or decrepit.

4. Not have been convicted of a felony or a misdemeanor involving moral turpitude.

5. Be intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly.

A person dwelling or lodging or having or maintaining a dwelling or lodging in a county for the greater part of the time between October first and June thirtieth next thereafter, is a resident of that county, within the meaning of this section. Added L. 1940, c. 202 § 1; amended L. 1967, c. 49 § 1; L. 1967, c. 548, § 1, both eff. Sept. 1, 1967."

HISTORICAL NOTE

Subd. 2, amended L. 1967, c. 548 § 1, eff. Sept. 1, 1967, which substituted "seventy five" for "seventy" and added "provided however * * * peremptory challenge."

Subd. 3, formerly 4, renumbered 3, L. 1967, c. 49, § 1, eff. Sept. 1, 1967. Former subd. 3, which required ownership of property valued at $250.00, was omitted L. 1967 c. 49 § 1, eff. Sept. 1, 1967.

Subds. 4, 5 formerly 5, 6, renumbered 4, 5, respectively L. 1967, C. 49 § 1 eff. Sept. 1, 1967.

Former subds. 4, 5 renumbered 3, 4.

Former subd. 6, renumbered 5.

PER CURIAM

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

LEWINSON *v.* CREWS.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 230. Decided October 14, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.